FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS BROADCAST MUSIC, INC., *et al.*

AMALYA L. KEARSE
GEORGE A. DAVIDSON
CONLEY E. BRIAN, JR.
Hughes Hubbard & Reed
One Wall Street
New York, New York 10005
(212) 943-6500
Attorneys for Petitioners Broadcast Music, Inc., et al.

TABLE OF CONTENTS

	PAGE
STATEMENT	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DISTRICT COURT'S FINDINGS UNDER RULE OF REASON ANALYSIS, UNCHALLENGED BY CBS IN THE COURT OF APPEALS AND ADOPTED BY THAT COURT, SHOULD NOT BE REVIEWED BY THIS COURT	3
A. CBS DID NOT PRESERVE AN ARGUMENT THAT DEFENDANTS' CONDUCT IS UNLAWFUL UNDER RULE OF REASON ANALYSIS	3
B. THE FINDINGS OF FACT OF THE COURTS BELOW SHOULD NOT BE REVIEWED BY THIS COURT	4
II. THE FINDINGS OF FACT BELOW DEMONSTRATE THAT THE OFFERING OF BLANKET LICENSES IS NOT INHERENTLY ANTICOMPETITIVE AND DOES NOT UNREASONABLY RESTRAIN TRADE	5
A. MIDDLEMEN AND BLANKET LICENSES ARE RESPONSES TO MARKET NEEDS	5
B. CBS IS NOT COMPELLED TO TAKE A BLANKET LICENSE, BUT COULD FILL ALL OR MOST OF ITS MUSIC NEEDS WITH DIRECT LICENSES	7
C. THE USER CHOOSES THE METHOD BY WHICH MUSIC WILL BE LICENSED	12

PAGE

III. THE RELIEF SOUGHT BY CBS WOULD BE HIGHLY ANTICOMPETITIVE 13

A. THE PROPOSED INJUNCTION AGAINST THE OFFERING OF BLANKET LICENSES TO TELEVISION NETWORKS WOULD LIMIT COMPETITION AMONG THE NETWORKS 13

B. THE PER USE PROPOSAL WOULD PLACE A CEILING ON DIRECT LICENSING PRICES 15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:

Broadcast Music, Inc. v. *National Broadcasting Company* (S.D.N.Y. 70 Civ. 1785) 7n

Comstock v. *Group of Institutional Investors*, 335 U.S. 211 (1948) 4

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 4

Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949) 4

Helvering v. *Pfeiffer*, 302 U.S. 247 (1937) 7n, 10n

United States v. *ASCAP* (S.D.N.Y. Civ. 13-95) 6n

United States v. *Nobles*, 422 U.S. 225 (1975) 4

United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) 4

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS BROADCAST MUSIC, INC., *et al.*

STATEMENT

In support of a court of appeals decision finding a *per se* violation of the antitrust laws, CBS has filed a 176-page brief, with a 100-page addendum of additional argument. Mindful of the admonition in Rule 40 that

briefs "must be compact, . . . concise, and free from burdensome, irrelevant, immaterial and scandalous matter," we find it impossible to address every one, or even many, of CBS' evidentiary contentions. We seek merely to restore this case to an intelligible context.

SUMMARY OF ARGUMENT

I. Procedurally, this Court is presented with extensive findings of fact made by the district court after a lengthy rule of reason trial. In the court of appeals, CBS sought reversal on the basis of per se illegality, and did not challenge the district court's conclusions under the rule of reason. The district court's findings of fact were adopted by the court of appeals. CBS' evidentiary contentions here should not be considered by this Court.

II. Substantively, the Court is presented with findings demonstrating that BMI's offer of blanket licenses is not a "naked restraint" and does not unreasonably restrain trade:

—performing rights licensing organizations and the blanket licenses they offer are responses to market needs rather than attempts by individual copyright owners to fix prices;

—direct licensing is a realistic alternative for CBS; the claims of impediments are discredited by the courts' findings; and

—the option to choose between available licensing methods belongs to the user of music, not to the individual copyright owner.

III. The "relief" proposed by CBS would be highly anticompetitive. The proposed injunction would eliminate one of the present licensing alternatives and, therefore, one of the methods by which the other television networks can

compete with CBS. The proposed per use license would place a ceiling on the prices at which direct licenses could be negotiated, thus limiting the market forces to movement in one direction only.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS UNDER RULE OF REASON ANALYSIS, UNCHALLENGED BY CBS IN THE COURT OF APPEALS AND ADOPTED BY THAT COURT, SHOULD NOT BE REVIEWED BY THIS COURT.

A. CBS Did Not Preserve an Argument that Defendants' Conduct Is Unlawful under Rule of Reason Analysis.

Throughout its presentation to the court of appeals on its Section 1 claims, CBS urged that the district court's decision be reversed as a matter of law. CBS argued solely that the conduct of the defendants constituted price fixing and was thus per se illegal. No question was presented as to whether the defendants' conduct, if not per se illegal, unreasonably restrained trade.

CBS' main brief in the court of appeals contained four Points. The first three argued price fixing and per se illegality; the fourth dealt with monopolization. CBS did not contend that, within the rule of reason context, the district court erred in its assessment as to the reasonableness of the offering of blanket licenses.

CBS' reply brief stated that, "[t]he thrust of this appeal is that the decision below should be reversed as a matter of law—*i.e., on the facts as the trial court found them.*" (Reply Brief for Plaintiff-Appellant at 1; emphasis in original.) And in oral argument CBS stated that the music licensing market should be analyzed only within the

per se framework: "I don't think it brings in any full blown rule of reason." (Transcript of Oral Argument, October 14, 1976, at 15.)

Since CBS did not challenge in the court of appeals the district court's conclusions under the rule of reason, reversal of the court of appeals' ruling of per se illegality would require that the judgment of the district court be reinstated. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 215 (1976).

B. The Findings of Fact of the Courts Below Should Not Be Reviewed by This Court.

The great bulk of CBS' 276 pages of briefs to this Court is devoted to factual argument, as if CBS wished to retry this case here. CBS' attack on the findings of the district court is foreclosed. This Court has long applied the "two-court rule," under which it refuses to re-evaluate evidence after two lower courts have agreed on findings of fact. *E.g., United States* v. *Nobles,* 422 U.S. 225, 242 n.16 (1975); *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 401 n.2 (1975); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949); *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214 (1948). In *Comstock* v. *Group of Institutional Investors,* the Court stated, "[a] seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

The two-court rule is applicable to this case. After a 29-day rule of reason trial, the district court reviewed the evidence at length and made extensive findings of fact. On appeal, the Second Circuit made clear that it had reviewed the record and adopted those findings. At the outset of its opinion, the court of appeals described Judge Lasker's opinion as "painstaking," and said, "we refrain

from restating the details of the evidence adduced at trial. We refer to that opinion for the evidence supporting the findings." (Pet. App. 2a.)

The wisdom of the two-court rule is underlined by the nature of CBS' evidentiary contentions in this case. In many instances CBS asks this Court, as it asked the district court, to reach conclusions on the basis of fragments of a witness' testimony taken out of context. The district court, which was thoroughly familiar with the trial record, characterized CBS' selections as "snippets," which, "when read in their entirety, . . . take on an entirely different hue." (Pet. App. 84a, 85a. *Compare* Brief for Respondent at 140 *with* the opinion of the district court at Pet. App. 83a-86a.) Without familiarizing itself with the nearly 5000-page transcript, the twenty-four depositions and the more than 500 exhibits received in evidence, this Court would be in no position to evaluate CBS' evidentiary arguments.

While CBS' briefs are of exceptional length, they do not make the exceptional showing of error required for de novo review of the concurrent findings of the courts below.

II. THE FINDINGS OF FACT BELOW DEMONSTRATE THAT THE OFFERING OF BLANKET LICENSES IS NOT INHERENTLY ANTICOMPETITIVE AND DOES NOT UNREASONABLY RESTRAIN TRADE.

A. Middlemen and Blanket Licenses Are Responses to Market Needs.

The existence of BMI, ASCAP, and similar organizations throughout the world and their offering of rights to use a large number of compositions without advance notice, without risk of infringement, and without substantial transaction costs are responses to the nature of the marketplace. There are vast numbers of users, vast numbers of copy-

right owners, and vast numbers of compositions. Most users could not obtain the music they need without a middleman.

There is no evidence whatever in the record that writers and publishers have granted BMI rights to license their music in order to fix the prices that they would receive for use of that music. The court of appeals found, as had the district court, that the offering of a blanket license is not a "naked restraint," and is not generally unlawful. (Pet. App. 21a n.26, 22a, 26a, 37a, 111a.) The courts found also that CBS failed to prove that the existence of the blanket licensing system would "affect the price for each set of individual performing rights" or cause the individual copyright owner to "measure the royalty he asks for a particular performing right by the royalty he has actually been receiving . . . under the blanket license." (Pet. App. 22a n.27, 115a.) Thus, the fundamental premise of cases such as *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), is utterly lacking here: CBS did not establish that the purpose of any copyright owner's affiliation with BMI was to "tamper with" price.[1]

1. CBS' citation of a Department of Justice statement made some years ago in support of a claim by NBC against ASCAP (Brief for Respondent at 165) ignores the different nature of NBC's attack on blanket licensing. In a proceeding under the ASCAP consent decree, NBC sought a license for approximately 2200 designated songs and claimed that ASCAP refused to license these wanted songs apart from the other songs in the ASCAP repertory. Although the Department of Justice (pointing out that the question before the court was solely what the consent decree required, and not what the antitrust laws required) supported NBC's contention that the decree required ASCAP to grant such a license, NBC withdrew its appeal and took a new ASCAP blanket license. *United States* v. *ASCAP* (S.D.N.Y. Civ. 13-95).

Subsequently, the bona fides of NBC's attack on blanket licensing was challenged by BMI. NBC asserted a similar claim against BMI for a license to approximately 500 of the songs in the BMI repertory, and claimed that these 500 songs were tied to the rest of the repertory.

(Footnote continued on following page)

B. CBS Is Not Compelled To Take a Blanket License, but Could Fill All or Most of Its Music Needs with Direct Licenses.

Despite the findings of the courts below, CBS continues to argue that direct licensing is not an alternative available to it without judicial assistance. It contends (1) that the preference of writers and publishers for dealing through a middleman would prevent direct licensing, (2) that there is no "machinery" to facilitate direct licensing, and (3) that, for music "in-the-can," copyright owners would charge premiums for direct licenses.[2] Each conten-

(Footnote continued from preceding page)

BMI moved for, and was granted, a prompt and separate trial on the issue of whether or not NBC's request for the limited 500-song license had been made in a good faith desire to have such a license. On the morning that trial was to begin, NBC elected to take a new blanket license from BMI. *Broadcast Music, Inc.* v. *National Broadcasting Company* (S.D.N.Y. 70 Civ. 1785).

CBS' tying claims here have no factual underpinnings whatever. As the district court found, there was no identifiable group of compositions that CBS could say it did not want to license. (Pet. App. 116a.) Since CBS could not in its own mind separate the wanted from the unwanted, it was not compelled to take a "tied" product. The dismissal of the tying claim was properly affirmed by the court of appeals. (Pet. App. 11a.) Since CBS did not file a cross-petition for certiorari to review the court of appeals' dismissal of the tying claim, that dismissal is final. *See Helvering* v. *Pfeiffer*, 302 U.S. 247, 250-51 (1937).

2. CBS also argues that it could not obtain direct licenses from BMI affiliates because BMI obtains exclusive rights from its affiliates. (*E.g.*, Brief for Respondent at 31n-32n, 57n.) This contention is unfounded and is precluded by the stipulation entered into between CBS and BMI prior to trial. (Pet. App. 32a-33a; 21 A. E387-89, 8 A. 1792-93.) Although the provision in the BMI Decree permitting direct licensing differs in form from the ASCAP provision (which uses the word "non-exclusive" with respect to the licensing right given ASCAP), CBS and BMI stipulated that in substance BMI writers and publishers are as free as ASCAP writers and publishers to grant performance licenses directly. (20 A. E127-28, 8 A. 1786-92; 24 A. E1570, 16 A. 4681-87.) CBS has been unsuccessful in its attempts to walk away from its stipulation in both courts below and should have no greater success here.

tion is refuted by the record and was properly rejected by the courts below.

1. *Attitudes of Copyright Owners: The "3M Incident"*

Whatever their preferences might be, every writer or publisher who testified at trial, with the single exception of CBS' own employee, said that if CBS chose not to take a blanket license, he would negotiate for licenses directly with CBS. (Pet. App. 90a.) The courts below found as fact that writers and publishers would deal directly. (Pet. App. 8a-10a, 111a-120a.)

CBS' continued reliance on the "3M Incident" to show that copyright owners would refuse to license CBS directly or would demand premiums for direct licenses is inexplicable. Some years ago the 3M Company sought licenses for compositions to be used on a series of background music tapes. After negotiations for a license from ASCAP proved unsuccessful, 3M sought licenses directly from certain ASCAP publishers. As the district court found, nearly 80% of the publishers contacted granted performance licenses directly to 3M. (Pet. App. 96a, 99a-100a.) And far from having to pay a premium, 3M paid 25% less for direct licenses than the amount it had originally offered to ASCAP. (Pet. App. 95a n.17.)

2. *Machinery: The "Tomorrow" Hypothesis*

At trial, CBS repeatedly questioned witnesses in terms of what, hypothetically, would happen if CBS announced that it would abandon its blanket license "tomorrow"; witnesses were asked whether direct licenses would be instantly available. The unreality of such a premise was quickly recognized by the district court. (Pet. App. 65a, 78a-79a, 112a-113a.) And while CBS repeatedly quotes the district court as saying that publishers would require "a long period of advance preparation" to create direct licensing facilities (*e.g.*, Brief for Respondent at 78n, 148-49), the phrase CBS quotes appears in a passage in which the court states that "there is no support in the record for the proposition that *CBS* could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation." (Pet. App. 65a; emphasis added.)

What the court found was that "the relatively modest machinery required" could "beyond doubt" be developed during a reasonable planning period. (Pet. App. 79a.)

3. *"In-the-Can": The Supposed Demand for Premiums*

CBS' argument that it could not obtain direct licenses for music in-the-can, *i.e.*, music incorporated in programs already in its inventory, without paying premium prices is specious for two reasons.[3]

First, CBS has in fact already made provision for direct licenses of much of its music in-the-can in the event it does not take a license from BMI or ASCAP. One sample agreement reads in part as follows:

> "If at any time during the Broadcast Periods CBS does not hold an ASCAP and/or a BMI license, the rights granted to CBS hereunder with respect to the motion pictures shall include non-dramatic music

3. It is, of course, CBS which controls putting the music into the can. And most of what CBS now has in-the-can was put there after this lawsuit was started. (Pet. App. 103a n.19.)

> performing rights for all compositions in the motion pictures."[4]

(BX 181 at ¶ 31, Transcript of Proceedings of March 21, 1974 ("March 1974 Trans.") at 70-74. *See also, e.g.,* BX's 172, 214, 215A, 217, 219, March 1974 Trans. at 20, 70-74.)

Second, the district court considered whether some "greedy" copyright owner might seek to "hold up" CBS with respect to music in-the-can, weighed the evidence, and rejected the testimony of CBS' principal witnesses (who had never even met a copyright owner) as "not persuasive." It found the testimony of the publishers that they would not exact premiums from CBS "highly persuasive." (Pet. App. 104a-105a.) The testimony of Albert Berman, who runs the Harry Fox synchronization licensing organization

4. The provision CBS has made for alternative licenses helps to demonstrate the fallacy of its monopolization claim. CBS claims that a BMI blanket license constitutes a relevant product market that BMI has monopolized in violation of Section 2 of the Sherman Act. The monopoly asserted by CBS is a tautological one, for as the district court observed, "a blanket license . . . , by definition, can be practicably obtained only through a collective licensing agent." (Pet. App. 120a.)

The "products" involved in this action are public performance rights to musical compositions suitable for network television use. Public performance rights, and not a BMI blanket license, are what CBS proposes to have its program producers secure directly from individual copyright proprietors and what CBS has conditionally secured in the agreement quoted in the text. A blanket license is merely a form of transaction for the acquisition of performance rights. The products CBS seeks are the rights themselves, and the rights themselves should not be confused with the way in which they are acquired.

Recognizing that the rights themselves are the products in question, the courts below properly rejected CBS' monopolization claim because there are alternative sources of supply for public performance rights. (Pet App. 23a, 118a-120a.) Since CBS did not file a cross-petition for certiorari to review the court of appeals' dismissal of the monopolization claim, that dismissal is final. *See Helvering* v. *Pfeiffer,* 302 U.S. 247, 250-51 (1937).

and who was called as a witness by CBS, was instructive as to why there would not be a hold-up. On examination by CBS, Mr. Berman

> "testified that television producers often prepare programs without synchronization licenses and negotiate such licenses *after* the programs are in the can without being 'held up.'
>
> 'A . . . There is a certain confidence on the part of producers that they will not be held up by publishers when they want to use a song after the fact.
>
> Q Do you have any opinion as to what the basis is for that confidence?
>
> A The basis is that the users and providers of music have to live together. Nobody wants to lock himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action.' (Tr. 981a-82)"

(Pet. App. 104a-105a; emphasis in original.)

Performing rights licensing is a business which depends not on getting a high price on a single sale to one user, but on getting many, many sales to the user at relatively low prices over a long period of time. In view of the pre-eminent position of CBS as perhaps the largest single user of music in the world today, as a common buying and selling agent for approximately 200 separate television stations, and as one of only three national commercial television networks, it is fanciful to suggest that a copyright owner would either refuse to deal with CBS or demand a premium price. (Pet. App. 90a-93a.) The realities of the world of entertainment make it quite easy to comprehend why the court of appeals found that a direct licensing market "*can*

exist," that this market "can exist *even beside* the blanket license," and that "a competitive market *is* available" (Pet. App. 10a, 16a, 18a; all emphasis in original), and why the district court concluded that, if CBS elected to seek direct licenses rather than a blanket license, copyright owners "would line up at CBS' door." (Pet. App. 85a.)[5]

C. The User Chooses the Method by which Music Will Be Licensed.

The power to choose the method by which music will be licensed belongs quite definitely to the user. The reason the user has the power to choose among the alternative methods is that it is the user who selects the music; if the user cannot license certain music by the transactional method he prefers, he will not use that music.[6]

The trial record contains evidence of only two actual efforts at direct licensing—the "3M Incident" described

5. The per program license, of course, is a useful complement to direct licensing. For situations in which it is not known in advance what compositions will be performed, the per program license provides coverage for hundreds of thousands of compositions for use on any program, without advance notice. The license fee is payable only with respect to a program that actually uses music in the repertory.

CBS' categorical statement that such a license "*cannot* be fashioned to permit" the royalty rate to vary if some, but not all, of the music used in a program has been licensed directly (Respondent's Addendum E at 2-3; emphasis in original) has no basis. The BMI single television station per program license, for example, was negotiated to provide a standard rate, and to provide a reduced rate if only a certain type or quantity of BMI music is used. (PX 438, 12 A. 3208-10.) As the district court said, "[b]ecause CBS has never sought to negotiate a per-program license, there is no way to know what its terms might be." (Pet. App. 110a-111a.) The court thus concluded that CBS had shown no reason, legal or factual, why it could not advantageously avail itself of a combination of direct licenses and per program licenses. (*Id.*)

6. This power results, of course, from the functional interchangeability of many songs for television network performances, a factor recognized by both courts below. (Pet. App. 12a, 48a, 92a, 119a-120a.)

above, and the Warner Brothers experience of the 1930's. They demonstrate beyond peradventure the user's absolute power of choice.

In the 1930's, Warner Brothers, a publisher, had a valuable catalog which included the works of such composers as Cole Porter, Rodgers & Hart, Oscar Hammerstein, Vincent Youmans and Jerome Kern. Warner decided to withdraw the catalog from ASCAP and to try to license broadcasters directly rather than through the ASCAP blanket license. The users, however, chose to take only ASCAP blanket licenses, and refused to take direct licenses from Warner. They simply played songs that were still available under the blanket license, and Warner Brothers' music was not used. (19 A. D645-55, 11 A. 3140-42, 3176h.)

On the other hand, 3M, a user, sought direct licenses from publishers; despite the preferences of some of the publishers for dealing through ASCAP, 3M obtained all the music it needed, at bargain prices, through direct licenses. Those publishers who would not license 3M directly did not have their music used.

In both of these situations, the copyright owners who did not license in the manner preferred by the user were excluded and did not have their music used. The preferences of the copyright owners, whether for direct licensing or for licensing through a middleman, were quite irrelevant.

III. THE RELIEF SOUGHT BY CBS WOULD BE HIGHLY ANTICOMPETITIVE.

A. The Proposed Injunction Against the Offering of Blanket Licenses to Television Networks Would Limit Competition Among the Networks.

Both courts below recognized that a market for direct licenses is now available, can function, and can function alongside the availability of blanket licenses. (Pet. App.

10a, 16a, 18a, 79a-108a, 111a-120a.) No injunction, therefore, is required in order to permit *CBS* to avoid having a blanket license.

The acknowledged goal of the injunction sought by CBS is to prevent *NBC* and *ABC* from having blanket licenses for their television networks if CBS elects not to have a blanket license. CBS' top executives testified at deposition that because blanket licenses provide the widest possible latitude for creative programming, CBS' programming would suffer, creatively, if CBS chose to do without a blanket license. (Paley, 19 A. D764-65, 16 A. 4705, 4722; Stanton, 19 A. D876-77, 16 A. 4705, 4720.) If NBC and ABC elected to keep blanket licenses, CBS' programs would have a "second-class appearance" and be "bush league compared to NBC and ABC." (Wood, 19 A. D1016-17, 16 A. 4705, 4721.) CBS Vice President Sipes testified at trial that NBC and ABC "would like to stay in the blanket license and watch me destroy myself." (3 A. 86.) CBS' counsel stated that, "given this vast number of compositions that the pool has, given indeed the immediate accessibility of all those compositions, given the programming flexibility which such a license affords, . . . no competitor [without a BMI or ASCAP license] could allow its competitor to have a license with that pool . . . ." (1 A. JA251.)

In the absence of an injunction, the market would be free to perform competitively. If CBS undertook to license performance rights directly, and the basic premise of this action were correct, *i.e.*, direct licensing proved cheaper and more desirable than blanket licensing, NBC and ABC could be expected quickly to abandon their blanket licenses without need for an injunction. On the other hand, if ABC or NBC viewed blanket licensing as the most desirable method of licensing performance rights—whether because of lower

cost, greater programming flexibility, or both—they could be expected to cling firmly to their blanket licenses.

The true role of the proposed injunction "to oust ASCAP [and BMI] from this market" (Brief for Respondent at 113) is at once apparent: it is to limit competition by NBC and ABC if it turns out that the blanket license is indeed the cheapest, most efficient, and most desirable method of licensing performance rights. The proposal to eliminate competition is an incredible perversion of the purposes of the antitrust laws. But it is exactly what CBS urges on this Court.

B. The Per Use Proposal Would Place a Ceiling on Direct Licensing Prices.

The proposed per use system is also designedly anti-competitive. As pointed out in our main brief at 30-32, the per use system would involve standard rates to be charged by BMI for each type of use of the music in its repertory, and would give CBS two ways to buy a single license for the same composition: it could license a particular song through a BMI per use license at the standard fee, or it could license that song directly from the copyright owner at a negotiated fee.

Given this choice of sources, CBS testified that it would license a song directly only if it could do so for less than the standard per use rate: "the only reason I would go to a copyright proprietor would be to attempt to get a lower price than under the schedule." (3 A. 198.) If the copyright owner sought a higher rate, CBS would either use that song under the per use license at the per use rate or use another copyright owner's song at the per use rate. (4 A. 334-38.) Thus the per use license would provide an artificial ceiling on the prices that could be negotiated by copyright owners in direct licensing transactions.

The ceiling effect is not eliminated by the so-called right of a copyright owner to withdraw a composition from the per use reservoir. The copyright owner would have that right only at certain intervals; he would rarely know, in time to withdraw and negotiate a direct license, that a program producer was interested in using his composition; and his withdrawal would be ineffective with respect to music recorded prior to the effective date of withdrawal, even though broadcast did not occur until after that date. Further, CBS indicated that withdrawal would be a signal to it that the owner of the music would seek to negotiate a price higher than the per use rate for a direct license, and CBS would therefore summarily eliminate withdrawn songs from its consideration. (3 A. 122; 4 A. 365, 428, 605; 5 A. 679-98.)

If CBS were to seek direct licenses now, it could buy in a truly competitive market: one in which prices are allowed to move up as well as down in reflection of relative values. The restriction sought to be imposed by CBS on upward movement of price is quite precisely designed to curtail free market competitive forces.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with directions that the district court judgment be reinstated with respect to BMI and its affiliates.

Respectfully submitted,

AMALYA L. KEARSE
GEORGE A. DAVIDSON
CONLEY E. BRIAN, JR.
Hughes Hubbard & Reed
Attorneys for Petitioners
Broadcast Music, Inc., et al.

January 1979.